in the
Supreme Court
of the
United States

October Term 1974

NO. 74-1401

GABRIEL BADARACCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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GABRIEL BADARACCO, Petitioner, prays that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the Fifth Circuit, entered March 14, 1975, rehearing denied April 8, 1975, affirming the June 12, 1974, Judgment and sentence of the United States District Court for the Southern District of Florida, adjudicating Petitioner guilty of possession of a controlled narcotic substance.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported in ____ F.2d ____, and is reprinted as Appendix A hereto, together with a copy of the Order denying rehearing (Appendix B).

JURISDICTION

The Judgment of the Fifth Circuit was entered on March 14, 1975, and a Petition for Rehearing was denied on April 8, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

WHETHER AN ADJUDICATION AND SENTENCE IN A CRIMINAL CASE MAY STAND WHERE THE TRIAL JUDGE PRECIPITOUSLY ACTS, THE DAY AFTER JURY TRIAL, ON MISINFORMATION AND MISUNDERSTANDING AS TO FACTS IN MITIGATION AND AS TO LAW PERTINENT TO ADJUDICATION AND SENTENCING?

II.

WHETHER MANDATORY DEPORTATION OF AN ALIEN FOR MINOR MISCONDUCT, ENGAGED IN LONG AFTER HE BECAME SETTLED IN THE UNITED STATES AND ASSIMILATED INTO AMERICAN CULTURE, IS SO UNJUSTIFIABLY DISCRIMINATORY AS TO VIOLATE EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS?

III.

WHETHER "AUTOMATIC" DEPORTATION OF AN ALIEN, FOR MERE SIMPLE POSSESSION OF A *DE MINIMUS* QUANTITY OF A PROHIBITED DRUG, IS INHERENTLY DISCRIMINATORY AND WITHOUT SUFFICIENT RATIONAL JUSTIFICATION, WHEN A CONVICTED MURDERER—ONE DANGEROUS TO OTHERS—WOULD NOT BE SO SUMMARILY AND HARSHLY TREATED?

STATEMENT OF THE CASE

Petitioner, an alien graduate student who has been in the United States since his preparatory school days, was arrested in Miami in 1974 and charged by information with possession and importation of 1.25 grams (approximately 1/25 of an ounce) of cocaine. The case of the UNITED STATES against Petitioner was tried before a jury in the United States District Court for the Southern District of Florida on June 10-11, 1974, and verdicts of *not* guilty on the importation charge and guilty on the possession charge were returned. [Jurisdiction is conferred upon the District Court by Title 18, United States Code, Section 3231.]

Following reading of the verdict late on June 11, Petitioner requested that the court withhold adjudication, pending the conduct of a pre-sentence investigation and preparation by Petitioner of a pre-sentence presentation on facts in mitigation and law pertinent to adjudication and sentencing. Yet, without explanation, the trial judge ordered appearance of Petitioner for sentencing at 3:00 P.M. on June 12, 1974.

Sentencing proceedings were in fact commenced at the set hour and date, at which time Petitioner presented what little evidence in mitigation he was able to gather in the short span of time between trial and sentencing and Petitioner's counsel presented his essentially unresearched interpretation of certain immigration statutes, having merely had the morning of June 12 to investigate the question of future impact of an adjudication on Petitioner, as an alien.

Petitioner requested at the hearing that the court withhold adjudication of guilt, the possession statute under which he was charged clearly evidencing congressional intent that adjudications be withheld where one does not appear to be a willful, dangerous and repetitive violator of the Act. 21 U.S.C. §844(b). Significantly, it was pointed out than an adjudication of guilt on the possession charge would likely result in Petitioner's "automatic deportation" under 8 U.S.C. §1251(a)(11), which authorizes the Attorney General of the United States to order one who has been convicted of "illicit possession" of drugs deported. Petitioner's counsel also described how an adjudication of guilt would likely proscribe Petitioner's becoming an accountant in the United States, his ultimate goal, and would likely result in official action being taken by federal or state authorities to bar Petitioner's continued education in the country.

Despite the clear questions raised by Petitioner regarding the propriety of an adjudication and despite the scant opportunity permitted Petitioner to present mitigating evidence and the law relevant to sentencing, the trial court adjudicated Petitioner guilty and placed him on probation for two years. The judge, concluding the misdemeanor possession charge was *not* encompassed by 8

U.S.C. §1251(a)(11)—not constituting "illicit possession" —and that Petitioner would *not* be subject to "automatic deportation", decided that the adjudication would not, in truth, have the impact feared by Petitioner. Nevertheless, the trial court expressly recommended in the Judgment that Petitioner *not* be deported, so that the adjudication would not have an unintended consequence.

While the court, at many points during the proceeding, expressed concern for Petitioner's future, in terms of education and admission into a profession, the court, without the benefit of any informed presentence investigation into the various states' accounting standards and into university admission policies and practices, appeared unconvinced Petitioner would be denied his professional license or graduate school admission by any fair-minded authorities.

Thereafter, Petitioner duly appealed to the Fifth Circuit Court of Appeals, asserting basically that the trial court erred in failing to withhold adjudication and refusing Petitioner a proper opportunity to prepare facts and law for the sentencing proceeding. Having discovered, following the adjudication, that the trial court's recommendation against deportation would *not*, in fact, be given its intended effect under 8 U.S.C. §1251(a)(11), merely because of the *type* of offense for which Petitioner was *found accountable*, Petitioner, alternatively, challenged the constitutionality of 8 U.S.C. §1251(a)(4), (a)(11), and (b), as they bore upon the sentencing process, under the equal protection clause and substantive due process. Rejecting *each* and *every* argument of Petitioner, the Fifth Circuit affirmed, without benefit of an opinion, the June 12, 1974, Judgment of the trial court, and further denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

AN ADJUDICATION AND SENTENCE IN A CRIMINAL CASE MAY NOT STAND WHERE THE TRIAL JUDGE ACTS ON MISINFORMATION AND MISUNDERSTANDING AS TO FACTS IN MITIGATION AND AS TO LAW PERTINENT TO THE ADJUDICATION AND SENTENCING PROCESS.

Fundamental fairness and due process of law command that a trial judge, when sentencing a defendant in a criminal cause, act only upon accurate information and complete knowledge of the law. *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United States v. Wilson*, 450 F.2d 495 (4th Cir. 1971); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); *United States v. Freeman*, 462 F.2d 290 (D.C. Cir. 1972) (dictum).

A sentence and adjudication may not rest upon "a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation" and any "misinformation or misunderstanding that is materially untrue . . . or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970).

Similarly, it has been concluded in the Sixth Circuit that reliance by the sentencing court upon "improper factors or the failure of the sentencing court to evaluate the available information in light of facts relevant to sentenc-

ing" is proper ground for order by the appellate court of a new sentencing hearing. *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971).

The trial court in the instant case acted upon misinformation and insufficient information concerning character, background and ability of Petitioner, and the likely impact of an adjudication of guilt upon him as a student and applicant for professional admission to practice accountancy in the various states of his choice. The trial judge misunderstood applicable statutes and thus failed to properly consider at the hearing the implications under the law of an adjudication upon Petitioner's future rights and privileges as an alien in this country. This misinformation as to the law and lack of factual data as to background is a direct result of the court's insistence that the hearing upon the adjudication and sentence be held immediately following trial and that the case be disposed of without delay, however brief.

Petitioner made an attempt in the few hours between trial and sentencing to obtain evidence of good character and ability, and actually was able to tender to the court one telegram and several letters. However, he feels and actually advised the court that additional time would have yielded even more convincing proof of his good conduct record, scholastic ability, reverence for the law, and good morals. More important, it would have afforded Petitioner sufficient time to contact and canvas the various state accountancy boards in whose jurisdiction he contemplated practice to determine the effect of a conviction (as opposed to a withholding of adjudication) for misdemeanor possession of a Federally controlled substance.

Petitioner does not, however, view the absence of factual evidence in mitigation to be as significant as the trial court's reliance upon inaccurate information as to pertinent provisions of immigration and naturalization law. Despite the arguments of Petitioner, the trial judge heard and *accepted* arguments of counsel for the government that Petitioner would *not* be subject to automatic deportation and would not be hindered in his educational and professional pursuits. Following the sentencing, Petitioner learned that he was, in fact, *immediately* subject to the quite harsh punishment of deportation for simple possession of a controlled substance, albeit a misdemeanor under 8 U.S.C. §1251. *Gonzalez de Lara v. United States*, 439 F.2d 1316 (5th Cir. 1971); *Will v. Immigration & Naturalization Service*, 447 F.2d 529 (7th Cir. 1971). Additionally, Petitioner learned that the United States Immigration & Naturalization authorities were already taking steps to block renewal of his "I-20 Permit", to thereby preclude him from enrolling and remaining in graduate school.

Finally, the point should be made that the trial court acted precipitously, forthwith adjudicating Petitioner guilty, in bold disregard of the sentencing alternatives made available under 21 U.S.C. §844(b). Despite the punitive limits of the misdemeanor possession provision—imprisonment of not more than one year, or a fine of not more that $5,000.00, or both—Congress has indicated that a sentence within the express punitive limits may be more serious than is warranted in a given case. If circumstances are discovered, either before or after verdict, which serve to minimize the effect or impact of the conduct charged, the federal courts may opt *not* to adjudicate the defendant guilty and the court may place him on probation for a

term. Upon successful completion of the probation period, the court may discharge the defendant and dismiss proceedings against him, without there ever being an adjudication of guilt. The quite obvious purpose of this probation provision is to protect onetime possessors (as opposed to sellers or vendors) of drugs from the grossly detrimental consequences, both in terms of civil rights and future employment opportunities, of a single transgression, in which the defendant may be as much a weak victim as a willful transgressor.

Significantly, the Sixth Circuit Court of Appeals determined in *United States v. Daniels* that it is improper for a trial judge, in a sentencing hearing, to routinely impose the "regular" penalty, *especially* where the statute involved authorizes a lesser sentence upon showing legal or factual grounds of mitigation. 446 F.2d 967 (6th Cir. 1971).

Federal Rule of Criminal Procedure 32(a) provides that before "imposing sentence the court shall afford the defendant an opportunity to . . . present any information in mitigation of punishment." The Rule requires an "individualized" approach to sentencing. *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973). This approach assumes that counsel for defendant is given an adequate opportunity to prepare and present information in mitigation, and that adequate pre-sentence investigations are conducted and reports prepared. *Kuzminsky v. Woodard*, 307 F.2d 195 (D.C. Cir. 1962).

This Court has held in a 1949 case, *Williams v. New York*, that the trial judge must possess as much informa-

tion as possible concerning a defendant's background and characteristics, so that the punishment may "fit the offender and not merely the crime." 337 U.S. 241, 247 (1949). Similarly, it was held by this Court in *Williams v. Oklahoma* that "the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." 358 U.S. 576, 585 (1959); see also, *Criminal Law—Severity of Sentence, As Well As Sentencing Procedure, Is Subject to Appellate Review in the Eight Circuit*, 23 DRAKE L. REV. 191 (1973).

In sanctioning the conduct of the trial court in the instant cause, the Fifth Circuit has held a trial judge in any southeastern District Court may summarily adjudicate and cause the criminal defendant in every case to suffer the "standard" or "usual" sentence, without regard to or consideration of facts in mitigation or impact under the law of a criminal adjudication on the individual, even where the criminal statute involved authorizes and suggests the *withholding of an adjudication of guilt* in a proper case.

The conclusion and decision of the Fifth Circuit is in *direct conflict* with the decisions and holdings of this Court and other courts of appeals in this country, which establish under due process the proper level of examination and knowledge required of a trial judge *before* adjudication and sentencing in a criminal case. Thus, an important question of federal law has been framed for this Court's examination.

II. & III.

[In the interest of concise presentation, Arguments II & III have been combined.]

A. MANDATORY DEPORTATION OF AN ALIEN FOR MINOR MISCONDUCT, ENGAGED IN LONG AFTER HE BECAME SETTLED IN THE UNITED STATES AND ASSIMILATED INTO AMERICAN CULTURE, IS SO UNJUSTIFIABLY DISCRIMINATORY AS TO VIOLATE EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS.

B. "AUTOMATIC" DEPORTATION OF AN ALIEN, FOR MERE SIMPLE POSSESSION OF A *DE MINIMUS QUANTITY* OF A PROHIBITED DRUG, IS INHERENTLY DISCRIMINATORY AND WITHOUT SUFFICIENT RATIONAL JUSTIFICATION, WHEN A CONVICTED MURDERER—ONE DANGEROUS TO OTHERS—WOULD NOT BE SO SUMMARILY AND HARSHLY TREATED.

Some eighteen categories of activities are listed within 8 U.S.C. §1251(a) for which an alien will, following detection, be subject to "automatic deportation" from the United States, upon order of the Attorney General. Paragraph (4) of subsection (a) provides very generally that an alien convicted of two crimes involving "moral turpitude", not arising out of a single scheme of criminal misconduct, will be subject to immediate deportation. While

paragraph (4) applies very generally to all criminal conduct, Congress has placed a very specific provision in the statute which governs drug offenses only. Paragraph (11) permits the Attorney General to order deportation of one "convicted of a violation of, or a conspiracy to violate, any law or regulation relating to illicit possession of or traffic in narcotic drugs." Although two convictions upon offenses involving moral turpitude are required under paragraph (4), a single conviction upon a narcotics charge will be deemed sufficient to support a deportation order.

Yet, in subsection (b) of 8 U.S.C. §1251, Congress qualified the rather stringent deportation provisions of subsection (a) by permitting the trial judge in a given case to recommend that the defendant not be deported. This provision nullifies the effect on one's alien status of a conviction for a deportable offense, the judge having decided that the individual has not committed such a heinous offense as would merit deportation. Such a recommendation is binding upon the Attorney General.

Nevertheless, by its terms, the recommendation clause is not applicable to convictions for drug offenses, including *de minimus* possession violations. 8 U.S.C. §1251(b). Congress has carved out an exception to 8 U.S.C. §1251(b), depriving any recommendation against deportation by the trial judge in a drug case of its intended effect.

The above described deportation provisions, as they apply specifically to Petitioner, and more generally as to aliens as a class, are constitutionally deficient, for their effect is to deny aliens due process and equal protection of the law. In a landmark decision, this Court determined in 1886 that the equal protection clause protects all "per-

sons" within the United States, whether citizens or aliens, from unlawful discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

While the equal protection clause is by its terms specifically applicable only to the states, the federal courts have traditionally stated that the equal protection concept is implicit in the Fifth Amendment of the United States Constitution as it applies to the Federal Government, the "equal protection of the law" principle being "subsumed within the due process concept of the Fifth Amendment, which governs federal action." *Aqua Caliente Band v. Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972); *Miller v. Laird*, 349 F. Supp. 1034 (D. D.C. 1972). According to this Court's decision in *Bolling v. Sharpe*, the concepts of equal protection and due process, "both stemming from our American ideal of fairness," are not necessarily mutually exclusive, but "discrimination may be so unjustified as to be violative of due process." 347 U.S. 497, 499 (1954). See also, *United States v. Cravan*, 478 F.2d 1329 (6th Cir. 1973); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

In order to determine whether a given governmental action contradicts or violates the equal protection concept, two tests have emerged. Comment, *Constitutional Protection of Aliens*, 40 TENN. L. REV. 235, 240 (1973). Under the traditional test the statute or governmental action is scrutinized to determine whether there exists a rational basis for the challenged classification. *Dandridge v. Williams*, 397 U.S. 471 (1970). Under a modern, more stringent test the Court will require that the governmental body show a "compelling governmental interest" in the discriminatory classification. Comment, *Constitutional*

Protection of Aliens, 40 TENN. L. REV. 235, 240 (1973). The compelling governmental interest test requires a showing that the classification is necessary to protect against "the gravest of abuses, endangering paramount interests." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Classifications which affect fundamental rights and which are inherently suspect will be examined to determine whether a compelling legislative interest exists and this Court has held that the government has the burden of proving a compelling public interest. *Shapiro v. Thompson*, 394 U.S. 618 (1970); *Loving v. Virginia*, 388 U.S. 1 (1967); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Korematsue v. United States*, 323 U.S. 214 (1944).

Significantly, this Court added alienage to race and nationality as an "immediately suspect classification", in the 1971 case of *Graham v. Richardson*. 403 U.S. 365 (1971). In holding the compelling governmental interest test to be applicable to alienage classifications, the Court stated:

> Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close, judicial scrutiny. Aliens as a class are a prime example of a discreet and insular minority . . . for whom such heightened judicial solicitude is appropriate.

Id. at 372.

Thus, the deportation statute material to the instant Petition must come under the scrutiny of the compelling governmental interest test. The statute is applicable solely to aliens—only an alien, not a citizen, convicted of crimes of "moral turpitude" or "illicit possession" of a narcotic drug is subject to the further penalty, in addition to normal criminal penalties, of "automatic" deportation. The statutory classification is, therefore, immediately and inherently suspect.

The very obvious purposes of 8 U.S.C. §1251 (a) (11) and (a)(4) are to eliminate the use of and traffic in narcotic drugs in the United States, and to discourage crimes involving "moral turpitude". Yet, these provisions apply exclusively to aliens, punishing them by the very severe mechanism of banishment. And it is significant that the deportation follows and is *in addition to* any other punishments imposed for violation of the specific criminal acts, to which all persons in the country are subject. Petitioner was convicted of a misdemeanor for simple possession and is being punished for a violation of 21 U.S.C. §844; yet, as an alien he is subject to the additional severe punitive measure of banishment, *despite* the trial court recommendation that he not be deported.

Petitioner certainly recognizes that persons who violate drug laws should be punished; but the obvious classification within 8 U.S.C. §1251(a)(11) and designation of aliens for an additional penalty is inherently oppressive and constitutes a denial of due process and equal protection of the laws. Imposed upon aliens are all the *obligations* of citizenship. Aliens pay taxes, serve in the military, on an equal footing with citizens, and are subject to all state and federal laws. As a concomitant to these obligations,

this Court has determined that aliens have a right to the protections of the Bill of Rights and that other "fundamental rights", such as the right to work and engage in the professions, may not be denied them. *Wong Wing v. United States*, 163 U.S. 228 (1896); *Sugarman v. Songall*, 93 S.Ct. 2842 (1973); *In re Griffiths*, 93 S.Ct. 2851 (1973). Certainly, in light of the very historic and significant role aliens have played in the United States, a "nation of immigrants", one must question whether the severe remedy of deportation, which serves to deprive an individual of his livelihood, liberty, property, and sometimes family, comports with common American concepts of equity, right and justice.

Substantive due process principles would also seem to render 8 U.S.C. §1251(a)(4), (a)(11), and (b), constitutionally deficient. These deportation provisions, as they interrelate and apply to Petitioner and other alien drug offenders, deny the accused fundamental fairness. The substantive due process concept, ancient but firmly established in constitutional law, commands that a law "be not unreasonable and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Sims v. Board of Education of the Independent School District No. 22*, 329 F. Supp. 678, 684 (D. N.M. 1971); *Roe v. Wade*, 410 U.S. 113 (1973).

The reasonableness of the challenged deportation provisions may be questioned on several different levels. As was earlier noted, 8 U.S.C. §1251 makes a distinction between crimes involving moral turpitude and drug offenses. If one is convicted of *two* crimes involving "moral turpitude", and the trial judge recommends against de-

portation, the individual will not be deported. However, if an alien is convicted of violating a single narcotics statute—a one-time offender—he will be deported, despite a recommendation by the trial judge to the contrary.

As another pointed example, an individual might murder two persons (a felony) under the "moral turpitude" provision and not be subject to deportation; yet, one convicted of simple use violation, possession of a narcotic (a misdemeanor), as was Petitioner in the instant case, is "automatically" deportable, the trial judge's recommendation to the contrary (as here) notwithstanding. The distinction made by the statute certainly lacks rationality, the punishment (deportation) failing to "have a real and substantial relation to the object sought to be attained," i.e., to terminate the commercial traffic in narcotic drugs. The punishment for which alien drug offenders are singled out—deportation without regard to Congress' announced purpose and intent—"is not reasonably calculated to cure the abuse," but goes beyond "the necessities of the case." *Roe v. Wade*, 410 U.S. 113 (1973).

Significantly, Petitioner has been an alien resident of the United States for many years, his preparatory school education and college education having been acquired in this country. He has been assimilated into the American system and culture, understanding and having a genuine appreciation for the laws of this nation. Sincere expressions of remorse were heard by the trial judge, Petitioner affirming and the trial judge apparently accepting, via probation, that there would be no likely further transgressions on his part. It should be pointed out that this affirmation has proven true, since the date of Petitioner's trial, his

conduct being in strict conformity with the law and there being no further attempt by him to experiment with any controlled substance.

Serious issues regarding constitutionality of the above described deportation provisions were presented to the Fifth Circuit, but were shunned by the court, as it summarily affirmed, without opinion, the trial court's adjudication and sentence. In its ruling, the Fifth Circuit decided against Petitioner on the very crucial constitutional and federal statutory questions presented above. The Fifth Circuit has thus decided important questions which should now be settled by this Court.

CONCLUSION

The trial judge adjudicated Petitioner guilty without giving his counsel an adequate or reasonable opportunity to research and present his interpretation of applicable provisions of criminal and deportation law, and to gather and present facts pertinent to Petitioner's character, morals, professional and scholastic ability, as well as his ability to continue, scholatically and professionally, in his long chosen profession, once he was the subject of a formal adjudication. According to decisions of this Court and other Circuit Courts, such conduct by a trial judge serves to deprive the accused of his due process rights under the Fifth Amendment. In affirming and approving the trial court's conduct, the Fifth Circuit has rendered a decision in pointed conflict with the clear and long-standing precedent of other appellate courts in the federal system.

In addition, Petitioner, a long term resident alien of this country, challenges the constitutionality of 8 U.S.C. §1251(a)(4), (a)(11), and (b), to the extent they prevent a trial judge from making a binding and effective recommendation against deportation and to the extent they single out aliens as a class for the very harsh additional punishment, in a misdemeanor criminal case, of *banishment*. To withstand constitutional scrutiny, an alien classification must be shown by the government to be founded upon a compelling purpose or interest with "reasonable means" selected to cure the "gravest of abuses, endangering paramount interests." No such showing was made in the appellate court below and in rejecting the position of Petitioner, serious questions of constitutional law and statutory application are thus presented for consideration and resolution by this Court.

One final point needs to be made by Petitioner in this petition. Not only did the Fifth Circuit sanction Petitioner's cursory treatment by the trial court, but the Fifth Circuit, itself, chose, once more, to summarily dispose of this case, declining to write an opinion and properly set out the grounds for its conclusion. Petitioner respectfully submits the Fifth Circuit's invocation of its Local Rule 21 in this, a criminal case, serves to deprive an individual of his right under the constitution and due process clause to have the merits of his case completely and seriously determined in the appellate system. The Fifth Circuit's *per curiam* decision has itself rendered Petitioner's effort to obtain certiorari unncessarily difficult, the actual basis of the Judgment being initially shrouded in secrecy.

Thus, Petitioner would respectfully request that this Court grant immediate certiorari and, under authority of

its recent decisions, that it remand this case to the Circuit Court for proper articulation of the grounds for its decision. *Northcross v. Board of Education of Memphis*, 412 U.S. 427, 93 S.Ct. 2201 (1973); *Taylor v. McKeithen*, 407 U.S. 191, 92 S.Ct. 1980 (1972); *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32 (1972). Thereafter, this case can and should proceed to its proper and complete adjudication, in this Court, on the merits.

Respectfully submitted,

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